In The

Supreme Court of the United States

October Term, 1979

No. 79-836

J. P. MITCHELL, WARDEN

Petitioner,

v.

TERRY LEE HARRIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PRELIMINARY STATEMENT

R. A. Young, Superintendent of the Virginia State Penitentiary, prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on October 19, 1979, where the Court reversed the United States District Court for the Eastern District of Virginia, Alexandria Division, and directed that Court to issue a Writ of Habeas Corpus.

OPINION BELOW

The opinion of the Court of Appeals has not been reported, and is included herein as Appendix A.

JURISDICTION

The jurisdiction of this Court to issue the Writ of Certiorari is this case is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment To The Constitution Of The United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTION PRESENTED

I. **Is A Defendant Subjected To Double Jeopardy Where His First Trial Ends In A Mistrial As A Result Of Failure By His Counsel And The Prosecutor To Fully Comply With An Order Permitting Discovery?**

STATEMENT OF THE CASE

Respondent was charged with first degree murder and with possession or use of a shotgun in the perpetration of a crime of violence. Prior to trial, he moved for discovery and inspection of certain materials in the possession of the Commonwealth. The motion was granted, and an order was entered directing discovery. Pursuant to the order, Respondent received certain materials.

At trial, however, on the attempted introduction of a photograph by the Commonwealth, Respondent objected, complaining that the photograph had not been produced

on discovery. The Trial Court then held a hearing and determined that neither counsel for the Respondent or for Petitioner had complied with the order and declared a mistrial. Respondent was subsequently tried for the same crime and found guilty.

After exhausting his available State remedies, Respondent filed a Petition for a Writ of Habeas Corpus in the United States District Court, Alexandria Division. Respondent complained that he has been subjected to double jeopardy. The District Court dismissed Respondent's Petition, and he appealed to the United States Court of Appeals for the Fourth Circuit. In its opinion of October 19, 1979, the Court of Appeals held that the Respondent had been subjected to double jeopardy in violation of the Fourteenth Amendment to the Constitution of the United States and directed the District Court to grant a writ of habeas corpus.

I. The Issue Of Whether The Respondent Was Subjected To Double Jeopardy Is A Substantial One Which Should Be Decided By This Court Because Well-Settled Principles Enunciated By This Court Have Not Been Applied.

Respondent was charged with first degree murder and with possession of a firearm in the perpetration of a crime of violence. Prior to trial he moved for discovery and inspection of certain materials in the possession of the Commonwealth. Pursuant to applicable Rules of the Supreme Court of Virginia, the Motion was granted, and an Order directing discovery was entered.

At his subsequent trial before the Circuit Court sitting without a jury, and during presentation of the evidence, Respondent objected to introduction of a certain photograph because it had not been produced prior to trial in accordance with the discovery order. The Trial Court stated that Respondent had not complained of failure to

produce the materials prior to trial and thereupon recessed the trial and held a hearing to determine why the discovery order had not been complied with. After hearing the evidence, the Court concluded that both counsel for the Respondent and for the Commonwealth had been "derelict" in their duties and responsibilities and declared a mistrial. The Court directed that both counsel then and there go through the materials and fully comply with the discovery order.

At the very least, counsel for the Respondent might easily have guessed that all materials he requested in the discovery process had not been produced. There is no question but that counsel for the Commonwealth did not carry out his duties with respect to the discovery process as fully as might have been the case. In view of this, the narrow issue presented has been that of whether the Trial Court acted improperly in declaring a mistrial and thereby caused the Respondent to be subjected at a subsequent trial for the same offense to double jeopardy.

This Court in *United States* v. *Perez,* 9 Wheat. 579 (1824), held that trial courts had the authority to declare a mistrial "whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of justice would otherwise be defeated." (9 Wheat. at 580). Subsequent to *Perez, supra,* this Court has many times applied the rule enunciated in *Perez, supra,* in a variety of circumstances.

In *Wade* v. *Hunter,* 336 U.S. 684 (1949), *reh. den.* 337 U.S. 921 (1949), this Court held that a defendant had not been subjected to double jeopardy when his court-marshal had been dismissed before a decision had been reached because a peculiar military tactical situation had prevented the attendance of additional witnesses within a reasonable time. This Court pointed out that it was stated in *Perez,*

supra, that "the sound discretion of a presiding judge should be accepted as to the necessity of discontinuing a trial."

Thereafter, in *Gori* v. *United States,* 367 U.S. 364 (1961), the Court applied the *Perez rule* and in doing so stated as follows:

> "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be obtained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." (367 U.S. at p. 368).

This Court further stated:

> "It would hark back to the formalistic artificialities of seventeenth century criminal procedure so to confine our federal trial courts by compelling them to navigate a narrow compass between Scylla and Charybdis. We would not thus make them unduly hesitant conscientiously to exercise their most sensitive judgment—according to their own lights in the intermediate exigencies of trial—for the more effective protection of the criminal accused." (367 U.S. at pp. 369-370).

In *United States* v. *Jorn,* 400 U.S. 470 (1971), this Court applied the *Perez* rule and held that the defendant had been subjected to double jeopardy when the Trial Judge had "abused his discretion in discharging the jury" and had "made no effort to exercise a sound discretion to insure that, taking all the circumstances into account, there was a manifest necessity for the *sua sponte* declaration of this mistrial."

In *Illinois* v. *Somerville,* 410 U.S. 458 (1973), this Court again reiterated what it has said in many cases, that there was no mechanical formula by which to judge double jeop-

ardy cases, and seemed to confine the decision which it had reached in *Jorn* to the specific facts therein presented, pointing out that the Trial Court in that case had acted in an "erratic" manner.

In *United States* v. *Dinitz,* 424 U.S. 600 (1976), the Trial Court had excluded defendant's counsel from the trial after he had continued to engage in improper argument. Defendant, however, insisted on the excluded counsel, and a mistrial resulted. This Court, while emphasizing that the defendant had ultimately requested the mistrial, also pointed out that the Court of Appeals had noted that counsel was clearly guilty of improper conduct which might have justified disciplinary action and stated that even if the Trial Court had overreacted, the record did not show bad faith or an intent to harass or prejudice the defendant. In his concurring opinion, Mr. Chief Justice Berger stated that the Trial Judge was under a duty "in order to protect the integrity of the trial, to take prompt and affirmative action to stop such professional misconduct."

In *Arizona* v. *Washington,* 434 U.S. 497 (1978), this Court seemed to emphasize discretion given a trial court in exercising its authority to declare a mistrial and pointed out that the requirement of a manifest necessity in order to declare a mistrial was not to be interpreted to mean that a mistrial could only be declared if it was "necessary."

The Double Jeopardy Clause of the Fifth Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Benton* v. *Maryland,* 395 U.S. 784 (1969). The fact that jeopardy attaches "begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial," however. *Illinois, supra.*

This Court recognized in *Jorn, supra,* that "a criminal trial is, even in the best of circumstances, a complicated affair to manage." (400 U.S. at p. 479). In the instant

case, the trial, at least in the eyes of the Trial Court, became a "complicated affair to manage" because both the Commonwealth's Attorney and Respondent's counsel had failed to live up to the standards of conduct which the Trial Court felt was owed by them.

To some extent, the circumstances presented in the instant case parallel those in *Dinitz, supra.* The case, therefore, is not one of first impression. What, however, places the case in a position of uniqueness is that the United States Court of Appeals for the Fourth Circuit departed from previous holdings of this Court, stating that one "major factor" to be considered in accessing the Trial Court's action was "whether a mistrial was necessary." Suggesting that the Trial Judge acted "unjustifiably" if "obvious and adequate alternatives to aborting the trial were disregarded," the Court clearly predicated its decision upon its finding that alternatives existed.

The decision of the Court of Appeals is significant in two ways. First, it is not in accord with *Dinitz, supra,* a similar case involving misconduct of counsel. Secondly, the decision departs from this Court's previous interpretation of "manifest necessity," interpreting the test so as to permit a mistrial only if it is "necessary," and improperly abridging discretion heretofore permitted trial courts.

CONCLUSION

For the foregoing reasons, certiorari should be granted, and the judgment of the Court below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Linwood T. Wells, Jr., Assistant Attorney General of Virginia, of counsel for the Petitioner, and a member of the Bar of the Supreme Court of the United States, do hereby certify on the 27th day of November, 1979, I mailed a copy of the foregoing Petition for Writ of Certiorari to Ralph S. Spritzer, Esquire, 3400 Chestnut Street, Philadelphia, Pennsylvania 19104, counsel for Respondent.

LINWOOD T. WELLS, JR.
Assistant Attorney General

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-6036

TERRY LEE HARRIS,

Appellant,

v.

R. A. YOUNG, Warden

Appellee.

Decided October 19, 1979

HAYNSWORTH, Chief Judge:

Harris was tried twice for the murder of Joyce Hutchins. His first bench trial ended when the judge, *sua sponte,* declared a mistrial because of noncompliance with his discovery orders. Harris was subsequently brought to trial before the same judge and found guilty. He then sought habeas relief claiming the second trial and conviction constituted double jeopardy. The district court denied relief and Harris appealed. We reverse, for we find the declaration of a mistrial was not supported by "manifest necessity" as required by the Fifth Amendment, and thus the second trial constituted double jeopardy.

I.

Harris shot and killed Joyce Hutchins on December 19, 1971. He was promptly arrested and charged with her murder and with the use of an illegal firearm in the com-

mission of a violent crime. After commitment to a mental hospital for examination, where Harris was found competent, his arraignment was scheduled for July 20, 1972.

On June 5, 1972, pursuant to the state rules of criminal procedure,[1] defense counsel sought the discovery and inspection of all tangible evidence to be introduced at trial.[2] On July 13, 1972, the court granted the defense motion and ordered the production of the evidence by noon on July 17, 1972. The court order was not fully honored by the Commonwealth, and certain evidence was not produced.

Harris was arraigned as scheduled on July 20, 1972. He pleaded not guilty, waived his right to a jury trial and the trial began. The Commonwealth's first five witnesses were presented in an orderly fashion, and they testified to some of the facts surrounding the murder. The murder weapon, a report of the medical examiner and autopsy, and photographs of the deceased were introduced without objection. The sixth witness was a Mr. Wymer, a police investigator. Wymer was shown two photographs which purported to represent bone fragments and blood which covered the floor of the room where Hutchins had been shot. Wymer said

[1] Va. S. Ct. R. 3A:14(b)(2) provides:

(b) *Discovery by the Accused.*

* * *

(2) Upon written motion of an accused a court may order the Commonwealth's attorney to permit the accused to inspect and copy or photograph designated books, papers, documents, tangible objects, buildings or places or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. . . .

[2] The motion sought to have the prosecution:

produce and permit the defendant and/or his attorney to inspect and copy or photograph all books, papers, documents, weapons or tangible objects which the Commonwealth proposes to produce in evidence.

that the photographs were accurate representations of the murder scene and identified what he asserted were bone fragments and blood. Defense counsel objected that Wymer was not an expert on the subject and the objection was overruled. Counsel then stated:

> Defense Counsel: I will further object to admitting the photographs into evidence in that the Commonwealth has failed to provide the defense with an opportunity to examine a copy of these prior to trial as ordered by the Court.
>
> The Court: Is it your position at this time—I wish you had informed the Court of this position before we started this case this morning. We're in the middle of a trial and we're here now having exhibits being introduced and you're now complaining about the fact that they have not satisfied a court order.
>
> Defense Counsel: Your Honor, I can't anticipate what the Commonwealth will or will not introduce in evidence. He gave us statements here which had diagrams of the body. I assumed possibly this is all he intended to introduce through the expert. I can't anticipate what he plans to do.
>
> The Court: What is your position at this time? Do you want this trial to go forward or do you want this trial to stop at this point?
>
> Defense Counsel: Your Honor, I'm objecting to the introduction of those photographs on the basis that they have never been made available to defense counsel prior to trial and the introduction of same would violate Mr. Harris' constitutional rights.

The trial judge then ordered the prosecution and defense counsel to testify concerning compliance with the court's pretrial discovery order. Defense counsel testified that after he received no material by noon of July 17, as required by

the order, he directed his legal assistant to communicate with the Commonwealth's Attorney. The Commonwealth's Attorney advised the employee that the material to be produced for inspection was available at the Prince William County Police Department. Defense counsel and his assistant proceeded there, but they were told the officer familiar with the matter was absent until July 19 and that no one present could be of help. Another call to the office of the Commonwealth's Attorney produced the advice that the documents would be made available there. When the men arrived at the office of the Commonwealth's Attorney, however, they were told the Bill of Particulars had been previously sent to them by mail. When nothing arrived in the mail on July 18, the following day, defense counsel sent the assistant back to the prosecutor's office to make copies of the answers to the defendant's pretrial motions. Defense counsel was provided with copies of the answers, but no reference to photographs appeared in the responses and no photographs were exhibited to counsel. Nothing arrived in the mail.

Following the testimony of both lawyers, the following colloquy took place:

> The Court: There never has been filed in this Harris case answers to the Bill of Particulars. There's nothing in the official record.
>
> Commonwealth's Attorney: I think it's been filed. It may not be in the file.
>
> The Court: I'll state this for the record. The Court on its own motion at this time declares a mistrial in this case and I state to you. [prosecution and defense counsel], you're officers of this Court and I find both of you derelict in your duties and responsibilities to this Court and the Court's order that I entered. I believe, on the 13th day of July.

> I'll direct you at this time before you leave this court room, you are to sit down, both of you, and to go through this evidence and to examine it and reproduce any part and every part you desire to do so. Do you understand the order of this Court?
>
> Defense Counsel: Yes, Your Honor.
>
> The Court: This case will come on again on Term Day for a new trial date.
>
> Defense Counsel: At this point I would like to state my objection to the Court declaring a mistrial in the case at this time, for the record.
>
> The Court: [To defense counsel] I also want this record typed. I think you have placed this Court in quite an imposition and an awful lot of people by not having complained to this Court prior to this case getting underway and then at the time this evidence starts to get introduced, you start to begin making your objections.
>
> The order of this Court again is that you gentlemen get together and go through this evidence. There will be no further complaints to be made in regard to examination of it and you're going to stay here until you examine it and if you are not satisfied you come across the street to my chambers and make the complaints today.

Harris was retried in October 1972 before the same judge, who found him guilty of both charges and sentenced him to life imprisonment on the murder charge and fifty years on the weapons charge. Harris appealed to the Virginia Supreme Court alleging his trial after a mistrial constituted double jeopardy, but the court declined to hear his case.

The district court rejected Harris' habeas claim and found the mistrial was supported by "manifest necessity."

II.

The parties agree that jeopardy attached at the first trial,[3] and that Harris objected to the judge's *sua sponte* declaration of a mistrial. They also agree there was no prosecutorial or judicial misconduct, overreaching, or bad faith involved in the mistrial ruling. Thus the controlling issue is whether the mistrial was justified by "manifest necessity."

The classic definition of "manifest necessity" is found in Mr. Justice Story's opinion in *United States* v. *Perez,* 22 U.S. (9 Wheat.) 579, 580 (1824):

> "We think that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. . . .But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office."

See United States v. *Scott,* 437 U.S. 82, 92-93 (1978); *Arizona* v. *Washington,* 434 U.S. 497, 505-08 (1978);

[3] Because Harris was tried before a judge, jeopardy attached when the court began to hear evidence. *See* Finch v. United States, 433 U.S. 676, 677 (1977); Lee v. United States, 432 U.S. 23, 27 n.3 (1977); United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977); Breed v. Jones, 421 U.S. 519, 531 (1975); Serfass v. United States, 420 U.S. 377, 388 (1975).

United States v. *Sanford,* 429 U.S. 14, 15-16 (1976); *Illinois* v. *Somerville,* 410 U.S. 458, 461-64 (1973); *United States* v. *Jorn,* 400 U.S. 470, 487 (1971) (plurality opinion); *Downum* v. *United States,* 372 U.S. 734, 735-36 (1963); *Gori* v. *United States,* 367 U.S. 364, 368-69 (1961). Because of the differing factual situations which might mandate a mistrial, the Court has consistently refused to apply the standard in a rigor or mechanical fashion. *E.g., Arizona* v. *Washington, supra,* 434 U.S. at 506; *Illinois* v. *Somerville, supra,* 410 U.S. at 462-66. Instead, each case must be carefully examined to determine if a "high degree" of necessity supports the mistrial order. *Arizona* v. *Washington, supra,* 434 U.S. at 506. In addition, *Arizona* and prior cases hold that a reviewing court must determine that the trial judge did not act irrationally or irresponsibly, and that the mistrial order reflects the exercise of sound discretion. 434 U.S. at 514.

The district court found the mistrial declaration was proper, and that the trial judge correctly aborted the trial to punish defense counsel for his failure promptly to object to noncompliance with the discovery order. Although it is not our duty to assess responsibility for the breakdown in discovery and the violation of the court order, we note neither side was without fault. The Commonwealth's Attorney was under a specific court order to produce the evidence. He was also under a general professional obligation, as an officer of the court, to comply in good faith with the order. American Bar Association, *Standards Relating to the Prosecution Function and the Defense Function,* § 3.11(b) (App. Draft, 1971); *see generally* American Bar Association, *Code of Professional Responsibility,* D.R. 1-102 (A) (5). Thus he may not be held blameless, though he appears not to have been informed that the police investigator was off duty and that the evidence had not been

produced. Defense counsel was more blameworthy. He was informed that the investigator would be back on the 19th, but he made no effort to contact him on that day nor did he report to the Commonwealth's Attorney or to the judge that the evidence had not been produced.

In determining whether the trial judge exercised sound discretion in declaring a mistrial, we must consider if there were less drastic alternatives to ending the trial.[4] If less drastic alternatives than a mistrial were available, they should have been employed in order to protect the defendant's interest in promptly ending the trial, and the Commonwealth's interest in rapid prosecution of offenders. *See generally* American Bar Association, *Standards Relating to the Function of the Trial Judge,* § 6.3 (App. Draft, 1972). If the problem of nondisclosure could have been solved without trial disruption, it should have been. If not,

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[4] We recognize the Fifth Amendment does not require a trial judge to make an explicit finding of "manifest necessity" before ordering a mistrial; and that he need not discuss and reject, on the record, alternatives to a mistrial. Arizona v. Washington, *supra,* 434 U.S. at 501, 516-17. But Perez requires that we determine whether the mistrial order reflects the exercise of sound discretion. One major factor to consider in assessing the wisdom of the trial court's action is whether a mistrial was necessary. If obvious and adequate alternatives to aborting the trial were disregarded, this suggests the trial judge acted unjustifiably. Therefore, we must examine the alternatives to a mistrial. *See* United States v. Jorn, 400 U.S. 470, 487 (1971) (plurality opinion); United States v. MacQueen, 596 F.2d 76, 82-83 (2d Cir. 1979); United States v. Pierce, 593 F.2d 415, 417 (1st Cir. 1979); United States v. Sanders, 591 F.2d 1293, 1299 (9th Cir. 1979); United States v. McKoy, 591 F.2d 218, 222 (3d Cir. 1979); Dunkerly v. Hogan, 575 F.2d 141, 146-48 (2d Cir. 1978); United States v. Starling, 571 F.2d 934, 941 (5th Cir. 1978); United States v. Spinella, 506 F.2d 426, 432 (5th Cir. 1975); United States v. Kin Ping Cheung, 485 F.2d 689, 691 (5th Cir. 1978); United States ex rel. Russo v. Superior Court of New Jersey, 483 F.2d 7, 14 (3d Cir. 1973); United States v. Tinney, 473 F.2d 1085, 1089 (3d Cir. 1973).

the responsible lawyer should have been punished, and not the defendant.

Here there were numerous potential remedies for noncompliance with the discovery order. Perhaps the most obvious response was to admit or exclude the photographs based upon a determination of counsel's fault. Because the photographs were not probative of guilt, it is inconceivable that either action could have afforded grounds for reversal or prejudiced the prosecution's case. The discovery rule allows for a continuance for disclosure and inspection if new matter surfaces upon trial.[5] This was an obvious solution to the problem. Indeed, the record indicates no reason why a short recess would not have sufficed to settle all discovery issues.[6] The rule explicitly authorizes the trial court to "enter such other order as it deems just under the circumstances." Although this power is not defined, the breadth of the language implies that the judge enjoys great power

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[5] Va. S. Ct. R. 3A: 14(g) provides:

> (g) Continuing Duty to Disclose, Failure to Comply—
> If, after disposition of a motion filed under this rule, and before or during trial, counsel or a party discovers additional material previously requested or falling within the scope of an order previously entered, that is subject to discovery or inspection under this rule, he shall promptly notify the other party or his counsel or the court of the existence of the additional material. If at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, or it may grant a continuance, or it may enter such other order as it deems just under the circumstances.

[6] In several cases the failure to grant a continuance was held an abuse of discretion, and the resulting mistrials were held not justified by "manifest necessity." *See* United States v. McKoy, 591 F.2d 218, 222-23 (3d Cir. 1979); Mizell v. Attorney General of New York, 586 F.2d 942, 947 (2d Cir. 1978); Dunkerly v. Hogan, 579 F.2d 141, 146-48 (2d Cir. 1978); United States v. Tinney, 473 F.2d 1085, 1089 (3d Cir. 1973).

to insure that his orders are obeyed. Finally, there is no indication that the traditional remedies for attorney misconduct, including censure, reprimand, contempt, or recommendation of disciplinary proceedings were not available in this case. *See generally* American Bar Association, *Standards Relating to the Function of the Trial Judge,* § 6.5 (App. Draft, 1972). There is no indication that any of these less drastic alternatives was considered prior to the declaration of a mistrial.

After jeopardy attaches, the defendant possesses a valued right to have his guilt or innocence determined before the first trier of fact. *See United States* v. *Scott, supra,* 437 U.S. at 93; *Crist* v. *Bretz,* 437 U.S. 28, 35-36 (1978); *Arizona* v. *Washington, supra,* 434 U.S. at 503, 505, 509, 516; *United States* v. *Dinitz,* 424 U.S. 600, 606 (1976); *Illinois* v. *Somerville, supra,* 410 U.S. at 466; *United States* v. *Jorn, supra,* 400 U.S. at 484, *Downum* v. *United States, supra,* 372 U.S. at 736; *Wade* v. *Hunter,* 336 U.S. 684, at 689 (1949). An improvidently granted mistrial precludes the particular tribunal, whether judge or jury, from passing on the accused's guilt and thus ending the confrontation between him and society. Because the Double Jeopardy Clause makes no distinction between bench and jury trials, the fact that Harris' trials were before the same judge is immaterial to a determination of whether his second trial violated the Fifth Amendment. *See United States* v. *Morrison,* 429 U.S. 1, 3 (1976); *United States* v. *Jenkins,* 420 U.S. 358, 365-66 (1975); *overruled on other grounds, United States* v. *Scott, supra; United States* v. *Boyd,* 566 F.2d 929, 932 n.4 (5th Cir. 1978); *United States* v. *Ajimura,* 446 F. Supp. 1120, 1122 (D.Hawaii 1978). After jeopardy attached at the July 20 trial, Harris possessed a valued right to have the judge decide his case that day, based upon the proof the Commonwealth could adduce. *See* Westen & Drubel,

Toward a General Theory of Double Jeopardy, 1978 S. Ct. Rev. 81, 89-90.

One fundamental aim of the Double Jeopardy Clause is to prevent the state, with all its resources and power, from making repeated attempts to convict a person for an alleged crime. Thus, whenever the first trial is not completed, a second proceeding may be unfair. Delay in ending a case prolongs the time during which the defendant is stigmatized by unresolved charges. It increases the financial and emotional burden on the accused, and it may increase the possibility of a mistaken finding of guilt.[7] *See United States* v. *Scott, supra,* 437 U.S. at 87, 95; *Crist* v. *Bretz, supra,* 437 U.S. at 35; *Burks* v. *United States,* 437 U.S. 1, 11 (1978); *Arizona* v. *Washington, supra,* 434 U.S. at 503-05; *United States* v. *Martin Linen Supply Co., supra,* 430 U.S. at 569; *United States* v. *Dinitz, supra,* 424 U.S. at 606; *Serfass* v. *United States, supra,* 420 U.S. at 387-88; *Green* v. *United States,* 355 U.S. 184, 187-88 (1957).

There is a strong public interest in affording the Commonwealth a fair opportunity fully to prosecute a person accused of criminal activity, but the prosecution may not proceed in violation of fundamental constitutional rights. One of those is that the person not be twice put in jeopardy. Harris was, for there was no manifest or high necessity for the declaration of a mistrial over the defendant's objection. It was declared on the basis of the presence of a very minor problem for which there were several obvious solutions which would have permitted the case to continue to a conclusion without material prejudice to either the prosecution or the defense and without material inconvenience to wit-

[7] Harris was imprisoned for three months between his first trial and his conviction, a not insubstantial time to endure the burdens created by pending felony charges.

nesses yet to be heard, the judge and other court personnel. Without any such necessity the declaration of the mistrial cannot be characterized as the exercise of sound discretion.

Because the first trial was improperly aborted, Harris had a constitutional right not to be retried, and his subsequent conviction cannot stand.

The judgment is reversed, and the case remanded to the district court with instructions to issue the writ of habeas corpus.

REVERSED AND REMANDED.